38. Specifically, we require that incumbent LECs offering in-region broadband CMRS services must do so through a separate corporate affiliate. The CMRS affiliate must:

> (1) maintain separate books of account, and must maintain the books, records, and accounts in accordance with generally accepted accounting principles (GAAP);[105]
>
> (2) not jointly own transmission or switching facilities with the affiliated LEC that the affiliated LEC uses for the provision of local exchange services in the same in-region market; and
>
> (3) acquire any services from the affiliated LEC on a compensatory arm's length basis, as required by our affiliate transactions rules. LEC transactions with the CMRS affiliate will be subject to the Commission's joint cost and affiliate transaction rules. Title II common carrier services or services, facilities, or network elements provided pursuant to Sections 251 and 252 that are acquired from the affiliated LEC must be made available to all other carriers, including CMRS providers, on the same rates, terms, and conditions.

2. Applicability of Safeguards to Out-of-Region CMRS Operations

39. As we recognized in the *Notice* in this proceeding, our competitive concerns regarding incumbent LEC provision of CMRS services extend only to the provision of "in-region" CMRS services[106] because concerns regarding discrimination in interconnection arrangements are not present outside of an incumbent LEC's wireline service territory.[107] In addition, the geographic separation between an incumbent LEC's in-region service area and out-of-region CMRS mitigates the potential for undetected improper allocation of costs.[108] With regard to interconnection, the lack of control of "bottleneck" local facilities means that an incumbent LEC providing CMRS "out-of-region" is similar to any other provider of CMRS.[109]

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[105] As we observed in the *Accounting Safeguards Order*, 11 FCC Rcd at 17618, ¶ 170, a requirement that the separate affiliates maintain their books, records, and accounts in accordance with GAAP will result in a uniform audit trail at minimal cost.

[106] *Notice*, 11 FCC Rcd at 16668, ¶ 57.

[107] *Dom/Nondom Order* at ¶¶ 206-08.

[108] *Id.* at ¶ 209.

[109] *See SBMS Waiver Order*, 11 FCC Rcd 3386 (1995).

40. Because the same can be said with respect to all out-of-region LEC provision of CMRS, we will not require any LEC to provide out-of-region CMRS offerings through a separate affiliate. We do not agree with AT&T Wireless and the Public Utilities Commission of Ohio that a separate affiliate requirement is necessary for out-of-region broadband CMRS. Those parties do not contend that an incumbent LEC can discriminate in favor of its affiliate outside its wireline service territory, and they offer no evidence to support their contention that cost misallocation and cross-subsidization cannot be sufficiently addressed through accounting requirements and other non-structural safeguards.[110] To the extent there is potential for incumbent LECs that provide out-of-region CMRS to engage in anticompetitive behavior or cost misallocations we believe that such potential is adequately addressed through accounting requirements and other non-structural safeguards.

41. We also recognize that CMRS license areas and incumbent LEC wireline service areas are not generally congruent. CMRS licensees typically have a well-defined geographic service area (*e.g.*, major trading area (MTA), basic trading area (BTA))[111] under our rules. Given this environment, commenters have indicated that there should be a clear line delineating when a LEC has a sufficient ability to leverage anticompetitively its market power arising from its control of bottleneck facilities to warrant requiring a separate affiliate.[112] We share this view and believe that the issue of incongruent LEC-CMRS territories presents issues no different than our "out-of-region" decision above.

42. Just as an incumbent LEC lacks the incentive and ability to use its own bottleneck facilities to discriminate or otherwise act anticompetitively against its affiliate's rivals when that affiliate is operating out-of-region, the incumbent LEC's incentives and ability to act anticompetitively are significantly attenuated where the area served by its bottleneck wireline facilities is a small fraction of the area served by its wireless operations. Indeed, in situations where there is de minimis overlap between the incumbent's wireline service area and its CMRS license area, that incumbent LEC is close to offering "out-of-region" services. Therefore, we believe it is appropriate to apply "in-region" CMRS structural safeguards only to an incumbent LEC whose wireline service area overlaps its CMRS license area to a significant degree. In delineating the degree of geographic overlap necessary for an incumbent LEC to be considered "in-region," we have examined other instances where we have applied similar geographic overlap rules. For example, Section 20.6 of the

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[110] *See* AT&T Wireless Comments at 13; PUCO Comments at 17.

[111] Rand McNally organizes the 50 states and the District of Columbia into 47 MTAs and 487 BTAs. *See* Rand McNally 1992 *Commercial Atlas & Marketing Guide* 123rd ed.

[112] *See, e.g.*, GTE Comments at 17 (submits that BOCs have significantly higher level of CMRS/LEC coverage overlap than non-BOC incumbent LECs); RCA Comments at 5-6 (contends that rural incumbent LECs are less likely than larger incumbent LECs to have significant wireless/wireline overlap); ITTA May 12, 1997 *ex parte* Comments at 2 (asserts that definition of in-region is overly broad).

Commission's Rules, 47 C.F.R. § 20.6 (which prohibits a single entity from holding more than 45 MHz of CMRS spectrum in the same area) determines geographic overlap of commonly-owned CMRS services via a population-based standard. "Significant overlap" of two CMRS services occurs when at least 10 percent of the population of one service's licensed service area is within another service's licensed service area.[113]

43. More recently, the Commission ruled in the *LMDS Second Report and Order* that incumbent LECs should not be eligible to obtain LMDS licenses "in region."[114] In that proceeding the Commission found that a 10 percent population overlap would be sufficiently substantial to trigger the ownership restriction[115] Given that the LMDS spectrum offers unique capabilities to increase competition in the local telephone market, the Commission concluded that the presence of incentives for inefficient use of spectrum could impede the development of local exchange competition. The Commission noted that in the case of cellular and PCS providers an overlap of less than 10 percent of the population is sufficiently small that the potential for exercise of undue market power by the operator is slight.[116] The Commission observed that the rule for LMDS should conform with the overlap rule used in conjunction with the CMRS spectrum cap,[117] and as a general matter that it is preferable to have rules for wireless spectrum that are as consistent as possible for the sake of overall simplicity, ease of compliance, and administrative efficiency.[118] Therefore, the Commission concluded that an incumbent LEC or cable company is "in-region" if 10 percent or more of the population of the BTA is within the LEC's authorized telephone service area or the cable company's franchised service area. We believe that the overlap concern articulated in the *LMDS Report and Order* is similar to the overlap concern we have with regard to LEC provision of CMRS. Therefore, we will define "in-region" CMRS to be a CMRS offering where 10 percent or more of the population covered by the CMRS service area is within the incumbent LEC's wireline service area. We note that in recent proceedings, we have

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[113] *See* 47 C.F.R. § 20.6(c).

[114] Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, CC Docket No. 92-297, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking*, FCC 97-82 (rel. March 13, 1997) (*LMDS Second Report and Order*) at ¶¶ 186-188; *recon., Second Order on Reconsideration*, FCC 97-323 (rel. Sept. 12, 1997).

[115] *LMDS Second Report and Order* at ¶ 187.

[116] *Broadband PCS Second Report and Order*, 11 FCC Rcd at 7876, ¶ 107.

[117] 47 C.F.R. § 20.6(c).

[118] *LMDS Second Report and Order* at ¶ 188.

authorized CMRS licensees to geographically partition their licenses.[119] Partitioning, therefore, gives incumbent LECs the ability to reduce the overlap between their wireline and CMRS operations to below 10 percent population overlap threshold.

44. We also believe it is appropriate for us to define the level of beneficial ownership between an incumbent LEC and an in-region CMRS operation that causes competitive concerns. Section 3 of the Communications Act provides that one company is an "affiliate" of another if that company has an ownership interest of more than 10 percent of the equity (or the equivalent thereof) of the other company.[120] We believe that this level of beneficial ownership accurately reflects the level of beneficial ownership which implicates our competitive concerns regarding the incumbent LEC's incentive to discriminate in favor of its CMRS affiliate. We recognize that our CMRS spectrum cap rules (Section 20.6 of our rules) establish a higher attribution threshold, an ownership interest of 20 percent or more in order to determine whether two licenses are commonly-owned. In the CMRS spectrum cap context, the Commission explicitly selected the higher threshold "in order to encourage capital investment and business opportunities in CMRS."[121] Our concerns here are different and center upon the possible anticompetitive consequences of a beneficial ownership relationship between an incumbent LEC and an in-region CMRS licensee. As a result, in this context we believe that the standard 10 percent attribution criteria should apply.

3. Applicability of Safeguards to All Broadband CMRS Services and All In-Region Incumbent LECs

45. Except as provided in section V.C., below, the separate affiliate rules we adopt today should apply to all in-region LEC broadband CMRS operations because all incumbent LECs have the incentive and ability to discriminate against unaffiliated broadband CMRS providers of every type -- not just cellular operators -- where there is sufficient overlap between the incumbent LEC's wireline service area and the CMRS service area. Thus, limited safeguards applicable to all in-region incumbent LECs for all broadband CMRS services are necessary to promote competitive communications markets and to achieve regulatory symmetry.

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[119] Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees, WT Docket No. 96-148, *Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 21831 (1996). Partitioning is the assignment of a geographic portion of a license. Disaggregation is the assignment of discrete portions or blocks of spectrum licensed to a geographic licensee or qualifying entity.

[120] 47 U.S.C. § 153(1).

[121] Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, *Report and Order*, WT Docket No. 96-59, GN Docket No. 90-314, 11 FCC Rcd 7824, 7881, ¶ 119 (1996).

46. The wireless telecommunications landscape has undergone dramatic changes since Section 22.903 was adopted in 1981. At that time, not only was the divestiture of the BOCs from AT&T two or three years away, but it was questionable whether cellular telephone service would be a commercially viable service. In the ensuing 16 years, however, cellular service has grown to a mass-market commercial service, and PCS, SMR and other services have begun to compete with cellular service.[122] Currently, each licensed geographic area may have, in addition to two cellular licensees,[123] three broadband PCS licensees with 30 MHz licenses and three broadband PCS licensees with 10 MHz licenses. Broadband PCS licensees have initiated service in 29 MTAs, and there are eight major cities with two competing PCS operators providing service.[124] This new and increased competition and convergence of services in the CMRS market has heightened the need for regulatory symmetry among commercial mobile radio services and among different kinds of CMRS providers. As the *Cincinnati Bell* court observed, the disparate treatment imposed on the BOCs affects their ability to compete in the ever-evolving wireless communications market. In this respect, we agree with commenters that have argued that any rule we establish today must promote regulatory symmetry, and that any costs imposed should apply to all CMRS providers.[125]

47. Some commenters have argued that the reference to commercial mobile services in Section 271(g)(3) limits our authority to retain Section 22.903 or similar safeguards.[126] These commenters argue that, by including commercial mobile services in the definition of "incidental interLATA services" (which are explicitly exempted from the structural separation requirements of Section 272), Congress intended to preclude the Commission from imposing safeguards on broadband CMRS.[127] Similarly, Bell Atlantic argues that the Communications

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[122] *See* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Radio Services, *Second Report*, FCC 97-75, (rel. March 25, 1997) (*Second Annual CMRS Competition Report*) at 20.

[123] The Commission originally licensed two cellular providers per market area; the A block license was reserved for a non-wireline entity and the B block license for a wireline entity. Cellular subscribership has increased from approximately 28 million in June 1995 to more than 44 million in December 1996. *See Second Annual CMRS Competition Report* at 9.

[124] *See Second Annual CMRS Competition Report* at 20.

[125] SBC Comments at 6; BellSouth Comments at 12-13.

[126] *See* Bell Atlantic/NYNEX Comments at 11-12; BellSouth Comments at 45.

[127] Section 271(b) of the Communications Act permits "Bell operating companies and their affiliates to provide incidental interLATA services (as defined in subsection (g))" in-region without creating a structurally separate affiliate. In our Non-Accounting Safeguards proceeding, we concluded that, with respect to incidental interLATA services, existing non-structural safeguards are sufficient to protect telephone exchange ratepayers and competition in telecommunications markets. *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21952-53, ¶ 97. In the

Act does not give the Commission authority to impose a separate affiliate requirement for the provision of services other than those listed in Section 272(a).[128] We disagree with these arguments. We believe that simply because Congress did not impose structural separation on BOC provision of interLATA CMRS does not limit the Commission's authority to impose a different level of regulatory requirements and separation on the provision of CMRS by a different class of carriers (in-region incumbent LECs). We note that Section 271(g)(3) only applies to the "interLATA provision" of CMRS service by BOCs and there is no indication that Congress intended this "incidental interLATA service" to include all forms of CMRS offered by all incumbent LECs. As to Bell Atlantic's argument that Section 272(a)(2) limits the areas over which we may impose a separate affiliate requirement, we note that Section 272(f)(3) states that we maintain authority to impose safeguards under other sections of the Act.[129] The Commission has traditionally used its general authority under the Communications Act to impose separate affiliate requirements.[130] Section 601(c)(1) of the 1996 Act also provides that we are not to presume that Congress intended to supersede our existing regulations unless expressly so provided.[131] Consequently, we conclude here, as we

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Accounting Safeguards Order, we concluded that for accounting purposes, incidental interLATA services will be treated as nonregulated services under our Part 32 affiliate transactions rules and Part 64 cost allocation rules, and accordingly costs associated with provision of those services may not be allocated to regulated services accounts. *Accounting Safeguards Order*, 11 FCC Rcd at 17573, ¶ 76.

Subsection (g), "Definition of Incidental InterLATA Services," includes in paragraph (3) the interLATA provision by a Bell operating company or its affiliate "of commercial mobile services in accordance with section 332(c) of this Act and with the regulations prescribed by the Commission pursuant to paragraph (8) of such section." Paragraph (c) of Section 332 of the Communications Act outlines the regulatory treatment of mobile services, and paragraph 332(c)(8) specifies that mobile service providers shall not generally be required to provide equal access to common carriers for the provision of toll services.

[128] Bell Atlantic Comments at 11.

[129] 47 U.S.C. § 272(f)(3).

[130] *See, e.g.*, Regulatory & Policy Problems Presented by the Interdependence of Computer & Communications Service and Facilities, 28 FCC 2d 291 (1970) (*Tentative Decision*); 28 FCC 2d 267 (1971) (*Final Decision*), *aff'd in part sub. nom. GTE Service Corp v. FCC*, 474 F.2d 2d Cir. 1973) (Computer I); Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), *Final Decision*, 77 FCC 2d 384 (1980), *aff'd sub nom.* Computer and Communications Industry Assoc. v. FCC, 693 F.2d 198 (1982), *cert denied* 461 U.S. 938 (1983); *Competitive Carrier Fifth Report and Order*, 98 FCC 2d 1191.

[131] Section 601(c) provides as follows:

> (c) Federal, State and Local Law.-
>
> (1) No Implied Effect. - This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

have in the past, that we have the authority to impose the separate affiliate and related requirements for services other than those listed in Section 272.[132]

48. In applying a separate affiliate requirement to all in-region incumbent LEC provision of CMRS and not just BOC provision of cellular service, we recognize that we are imposing certain costs on, and limiting flexibility for, independent LECs, which were not previously subject to these requirements or to any of the other requirements of Section 22.903. In that regard, we have carefully considered the arguments of independent LECs that across-the-board imposition of structural safeguards would be inconsistent with the aim of Congress and the Commission to decrease regulation and to increase telecommunications providers' flexibility in designing their service offerings. Nevertheless, the competitive concerns regarding the ownership and control of bottleneck facilities are significant so long as there is a substantial geographic overlap between the incumbent LEC's wireline local telephone service area and the LEC's CMRS service area. When that overlap passes the 10 percent overlap threshold, we conclude that the benefits of preventing the competitive harm inherent in the incumbent LEC-CMRS relationship significantly outweigh the costs imposed by these safeguards.

49. The record supports our conclusion that the costs imposed on independent LECs by the separate affiliate requirement will not be so significant as to outweigh their benefits. Indeed, we note that PacTel has chosen to provide PCS through a separate affiliate even though it is not required to do so.[133] In addition, the BOC provision of cellular service has prospered and proliferated even under the significantly more restrictive regulations of Section 22.903. For incumbent LECs that already have established a separate affiliate to provide in-region CMRS services for business reasons, the requirements we adopt today will not impose significant additional costs. To the extent that incumbent LECs are concerned that imposition of a separate affiliate requirement will impair their ability to offer integrated wireline and wireless services, our rules do permit the creation of certain bundled and integrated service

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Telecommunications Act of 1996, Pub. L. No. 104-104, sec. 601(c), 110 Stat. 56, 143 (to be codified as a note following 47 U.S.C. § 152). In the *Dom/Nondom Order* we found that Congress did not intend to repeal Commission authority to impose on independent LECs separation requirements we deem necessary to protect the public interest consistent with our statutory mandates. *Dom/Nondom Order* at ¶ 168

[132] *Cf. Interim BOC Out-of-Region Order*, 11 FCC Rcd 18564 (1996) (Commission concludes that Congress' failure to specify structural safeguards does not imply that Commission lacks authority to impose *Competitive Carrier Fifth Report and Order* safeguards on BOC out-of-region services); *See also Dom/Nondom Order* at ¶ 168

[133] As we pointed out in the *Notice*, PacTel chose to provide PCS through a separate affiliate for three reasons: (1) since PCS is a competitive service with associated risks, a separate affiliate will permit a different compensation system that reflects that risk; (2) a separate affiliate will provide a more discrete measurement of operating results; and (3) a separate affiliate provides the benefit of a single purpose entity that can still take advantage of economies of scope. *Notice*, 11 FCC Rcd at 16688, ¶ 102 (*citing* PacTel Plan at 4-6).

packages, either through an incumbent LEC's offering facilities and services to the CMRS affiliate on nondiscriminatory terms, or solely through the CMRS affiliate that is able to offer competitive local exchange service.[134]

50. Particularly with respect to interconnection, we believe a separate affiliate requirement is a very effective way to afford the requisite degree of "transparency" to enable competitors and the Commission to detect discrimination in interconnection. Without a separate affiliate requirement, non-affiliated CMRS providers would have greater difficulty determining whether their interconnection arrangements with the LEC are comparable to those between the LEC and its affiliated CMRS provider.

51. We recognize that this decision represents a departure from our prior decisions addressing broadband PCS, CMRS, cellular, and SMR. We previously declined to adopt structural safeguards for broadband PCS providers affiliated with LECs, for LECs with CMRS affiliates, for LECs other than AT&T (and subsequently the BOCs) and the LECs with SMR licenses. In those decisions the Commission decided that the potential economies of scope achieved by dispensing with structural safeguards outweighed the potential risks of anticompetitive behavior and that existing accounting safeguards were sufficient to protect against cross-subsidization. With regard to broadband PCS, as discussed above, the Commission thought compliance with Parts 32 and 64 of the Commission's rules and conditioning commencement of operations on implementation of plans for nonstructural safeguards against discrimination and cross-subsidization would be sufficient.[135] The Commission reached the same conclusion with regard to CMRS.[136] Similarly, with regard to cellular, it decided that the benefits of structural separation did not outweigh the costs that such a requirement would impose on independent LECs.[137] Finally, in addressing SMR, the Commission concluded that the existing regulatory safeguards were sufficient to prevent possible discrimination and cross-subsidization.[138]

52. Our decision today strikes a different balance between our interest in fostering efficient provision of CMRS and our commitment to prevent unlawful discrimination and other anticompetitive practices by incumbent LECs than our earlier decisions discussed above. Our earlier decisions were not based on a full analysis of the competitive harms that might result from LEC provision of SMR, PCS, and cellular, particularly with respect to

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[134] *See, e.g., ACI Waiver Order,* 12 FCC Rcd 6331.

[135] *Broadband PCS Second Report and Order,* 8 FCC Rcd at 7751-52, *¶ 126.*

[136] *CMRS Second Report and Order,*9 FCC Rcd at 1492, ¶ 218.

[137] *Cellular Reconsideration Order,* 89 FCC 2d 58.

[138] *SMR Wireline Order,* 10 FCC Rcd at 6293-94, ¶¶ 22-24.

discrimination against unaffiliated competitors requesting interconnection. In part, our interest in ensuring that PCS was a viable service may well have caused us to underestimate the real and substantial incentives and ability of incumbent LEC's discriminating against unaffiliated CMRS providers.

53. In the *Broadband PCS Second Report and Order* the Commission anticipated that the new PCS industry would compete with the existing cellular industry.[139] In addition, subsequent to our PCS and CMRS decisions, changes in the telecommunications marketplace and in its regulatory environment have occurred that have helped to focus our attention on, and heighten our awareness of, the problem of discriminatory interconnection, as discussed above.[140] Significant developments have occurred in the CMRS market since adoption of *Broadband PCS Second Report and Order, CMRS Second Report and Order*, and *Cellular Reconsideration Order* that may increase the incentive for anticompetitive behaviors such as discriminatory interconnection. For one, the 1996 Act seeks to facilitate direct competition against all incumbent LECs from a variety of sources -- including, among others, CMRS and long distance carriers. Second, as discussed above, CMRS competition has also increased substantially. With increased competition in the CMRS marketplace, the incentive for anticompetitive behaviors, particularly discrimination against CMRS competitors requesting interconnection, may well increase. Prior to the development of PCS, each BOC competed almost entirely against a single licensee in duopolistic cellular markets.

54. Third, fixed wireless technology has developed to the point where it has the potential to provide a competitive alternative to the incumbent LEC network. The Commission has also determined that fixed wireless services can be offered on CMRS spectrum.[141] In the wake of the development of fixed wireless services, incumbent LECs and CMRS operators are increasingly likely to be direct competitors, and wireless carriers can no longer appropriately be regarded as merely providers of adjunct services. The competitive pressure brought to bear on the local exchange market by CMRS providers could increase the incentive for LECs to engage in discriminatory and other anticompetitive practices.

55. In addition, the Commission has recently expressed in several contexts its concern that incumbent LECs have an incentive to engage in price and nonprice discrimination in their wireline local service areas. In several of these proceedings, we have found various structural and accounting safeguards to be useful in identifying and deterring anticompetitive conduct by

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[139] *Broadband PCS Second Report and Order*, 8 FCC Rcd at 7710, ¶ 18.

[140] *See supra*, ¶ 46.

[141] Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, WT Docket No. 96-6, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 8965 (1996) (*CMRS Flex Order/FNPRM*). The *FNPRM* seeks comment on, among other things, the regulatory treatment of fixed services offered on CMRS spectrum. A decision on the *FNPRM* is still pending.

incumbent LECs that control bottleneck facilities.[142] In the *Dom/Nondom Order* and in the *Non-Accounting Safeguards Order*, we recognized the potential for an incumbent LEC to use its market power in the provision of local exchange and exchange access services to discriminate against its interstate (or interLATA) interexchange affiliate's competitors to gain an advantage for its interexchange or interLATA affiliate, and imposed regulation to deter such behavior.[143] Similarly, in the *Local Competition NPRM*, we recognized that "[an incumbent] LEC may have the incentive and the ability to prevent or reduce the demand for interconnection with a prospective local competitor, such as a CMRS provider, below the efficient level by denying interconnection or setting interconnection rates at excessive levels."[144] In implementing the local competition provisions of Sections 251 and 252 of the Communications Act, the Commission was required to examine issues regarding fair and non-discriminatory interconnection for all telecommunications carriers, including CMRS providers.[145]

56. In light of these developments, we have attempted to strike the appropriate balance in adopting our regulations today. On the one hand, some commenters have argued that there is, and historically has been, little evidence of anticompetitive behaviors in the provision of CMRS by BOC and non-BOC LECs. On the other hand, as discussed above, other commenters have argued that anticompetitive behaviors persist, and we are sensitive to the rapidly changing nature of the CMRS marketplace, which may create even larger incentives for anticompetitive conduct. With these various concerns in mind, we have sought to eliminate the prohibitions of Section 22.903 that are overly burdensome and that are not effective in constraining anticompetitive practices of LECs in their provision of CMRS, or that, in light of other regulations we adopt today, or other regulations already in place, may no longer be necessary. Instead, we have sought to impose upon all LECs what we believe

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[142] *See, e.g., Non-Accounting Safeguards Order*, 11 FCC Rcd 21905 (1996); *Accounting Safeguards Order*, 11 FCC Rcd 17539 (1996); and *Dom/Nondom Order*.

[143] *Dom/Nondom Order* at ¶ 111; *Non-Accounting Safeguards Order*, 11 FCC Rcd 21905 (1996).

[144] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, *Notice of Proposed Rulemaking*, 11 FCC Rcd 14171, 14177, ¶ 12 (1996) (*Local Competition NPRM*).

[145] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, *First Report and Order*, 11 FCC Rcd 15499 (1996) (*First Local Competition Order*), *motion for stay of the FCC's Rules Pending Judicial Review denied*, FCC 96-378 (rel. Sep. 17, 1996), *partial stay granted, Iowa Util. Bd. v. Federal Communications Commission*, No. 96-3321, WL 589204 (8th Cir. Oct. 15, 1996) (*Iowa Utilities Board v. FCC*), *Order Lifting Stay in Part*, (8th Cir. Nov. 1, 1996), *vacated in part* (8th Cir. July 18, 1997); Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, *Second Report and Order and Memorandum Opinion and Order*, FCC 96-333 (rel. Aug. 8, 1996) (*Second Local Competition Order*); *appeal docketed, Bell Atlantic Telephone Companies v. FCC*, No. 90-567 (D.C. Cir. Sept. 16, 1996), *People of the State of California v FCC*, No. 96-3519 (8th Cir. Sept.23, 1996), *SBC Communications Inc v. FCC*, No. 96-1414 (D.C. Cir. Nov. 1, 1996).

are less burdensome and more narrowly tailored safeguards designed to restrain LEC anticompetitive behavior, particularly discrimination in the provision of interconnection to unaffiliated CMRS providers.

4. Basis for Level of Safeguards

57. The structural safeguards we adopt today are substantially similar to those we recently adopted with regard to independent LEC provision of in-region interstate, domestic, interexchange service, and are similar to the separate affiliate requirements the Commission adopted in the *Competitive Carrier Fifth Report and Order*.[146] As described above and in the *Notice*, we conclude that these safeguards are appropriate to ensure that an incumbent LEC does not anticompetitively favor its in-region CMRS operations with regard to interconnection charges and practices. We believe that these safeguards provide an adequate measure of transparency between an incumbent LEC's wireline and in-region CMRS operations so as to prevent improper cost allocations and to ensure that competing CMRS providers are receiving nondiscriminatory treatment.

58. We are persuaded that less-stringent CMRS affiliate requirements than those currently in place for BOC provision of cellular service will be sufficient for the Commission and competitors to detect cost-shifting, discrimination, and other anticompetitive behavior by incumbent LECs. Our affiliate transactions rules and the requirement of separate books of account are useful to both the Commission and competitors to detect and address potential misallocation of costs and/or assets between a LEC and its CMRS affiliate. Any transaction between the incumbent LEC and its CMRS affiliate becomes subject to the Commission's affiliate transactions rules,[147] which serve to prevent cost misallocation.

59. Some commenters contend that our price cap regulations reduce the risk of improper cost allocations or other anticompetitive activity and therefore eliminate the need for more stringent safeguards.[148] Other commenters contend that price cap regulation cannot eliminate the ability or incentive for cross-subsidization because the current price caps framework is not a "pure" price cap scheme, as it still has a sharing element and low end

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[146] *See Dom/Nondom Order.*

[147] 47 C.F.R. § 32.27.

[148] *See, e.g.*, SBC Comments at 5-6 (arguing that there is no reason to impose the costs or inefficiencies of the structural separation rules on the BOCs when the basis of the rules, cross-subsidization and discrimination, can be addressed via existing or streamlined non-structural safeguards); Ameritech Comments at 7-9 (arguing that the concept of cross-subsidy is meaningless since the permissible level of rates for basic services is not dependent on underlying costs and there is no reason why nonstructural safeguards would not work in the context of BOC/LEC provision of CMRS); Ameritech Reply Comments at 6; GTE Comments at 12-13 (*citing Computer III* for the argument that the Commission's existing rules combat the potential for cross-subsidy).

adjustment, and the periodic readjustment of the productivity factor creates additional incentives to improperly adjust costs.[149] We conclude that, while price cap regulation may reduce the incentive for misallocation of costs of the nonregulated wireless services,[150] it does not entirely eliminate that incentive.

60. The Commission recently revised its price caps regime, which governs, among other things, the provision of local exchange access services by the BOCs and certain other LECs, to eliminate the sharing mechanism.[151] This revision substantially reduces, but does not eliminate entirely the BOC's incentive to misallocate costs, since the price caps regime still retains a rate-of-return aspect in the low-end adjustment mechanism.[152] Furthermore, periodic performance reviews to update the X-factor could replicate the effects of rate-of-return regulation, if based on a particular carrier's interstate earnings rather than industry-wide productivity growth.[153] Price cap regulation alone, however, does not eliminate entirely the incentive for cost-misallocation, and we believe our affiliate transaction rules will also help prevent cost misallocations.

61. We also believe that the safeguards we adopt today ensure the minimum necessary level of transparency to police the price and nonprice discrimination concerns discussed above. Our requirement that certain services, facilities, and network elements provided by the incumbent LEC to its CMRS affiliate must also be available to independent CMRS operators on the same prices, terms, and conditions ensures that these transactions between the incumbent and its CMRS affiliate will be arms-length transactions. We anticipate that interconnection arrangements between the incumbent LEC and its CMRS affiliate will be undertaken pursuant to tariff or through Section 251 negotiated or arbitrated interconnection agreements that are available to all CMRS carriers. As discussed more fully below, the prohibition on joint ownership of incumbent LEC landline transmission and

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[149] *See, e.g.*, AirTouch Comments at 3; AT&T Wireless Comments at 8; Comcast Comments at 13; MCI Comments at 9-10; PUCO Comments at 7; AT&T Wireless Reply Comments at 8-9.

[150] *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 21952-53, ¶ 97 (concluding that, with respect to incidental interLATA services, the BOCs are subject to price cap regulation at the federal level and in many states, which reduces their incentive to engage in strategic cost shifting behavior).

[151] *See* Price Cap Performance Review for Local Exchange Carriers, *Fourth Report and Order in CC Docket No. 94-1 and Second Report and Order in CC Docket No. 96-262*, FCC 97-159, ¶¶ 148 - 155 (rel. May 21, 1997) (*Price Caps Fourth Report and Order*).

[152] The low-end adjustment mechanism permits a LEC with a rate-of-return less than 10.25 percent to increase its price cap index to a level that would enable it to earn 10.25 percent.

[153] We stated in the *Price Caps Fourth Report and Order*, however, that in our next performance review we plan to focus on ensuring that we do not replicate rate-of-return effects. *Price Caps Fourth Report and Order* at ¶ 180.

switching facilities provides further assurance that the incumbent LEC will not be able to misallocate costs or discriminate against the affiliate's competitors. We note that this restriction does not prevent an incumbent LEC or its CMRS affiliate from offering bundled telecommunications services, provided that similar functionality is available to independent CMRS providers. These protections also do not prevent the CMRS affiliate from building integrated wireless-wireline networks, as the CMRS affiliate is free to construct (or accept from the incumbent LEC under nondiscriminatory terms and conditions) wireline local facilities.

62. In addition, we do not believe that more stringent safeguards are necessary to prevent an anticompetitive price squeeze by an incumbent LEC. A price squeeze could occur if, for example, an incumbent LEC raises its interconnection prices or somehow makes it more expensive for its in-region CMRS rivals to obtain access to an essential production input, *i.e.*, interconnection to the BOC's landline network, and this action by the LEC requires the competing CMRS carriers to raise their retail rates, accept a degradation in service quality (and lose market share to the LEC's CMRS affiliate in either case) or accept lower profit margins. We do not believe that price squeezes will be more likely without Section 22.903 because of the new interconnection obligations imposed on LECs in the 1996 Act. Incumbent LECs must make interconnection available to CMRS providers offering telephone exchange service and exchange access service in conformity with the terms of Sections 251(c) and 252, including offering rates, terms, and conditions that are just, reasonable, and nondiscriminatory. Section 252 requires incumbent LECs to negotiate interconnection agreements, and also provides for mediation and arbitration by the state commissions. We find that Sections 251 and 252, together with our affiliate transactions rules, reduce the risk of such price squeezes. With regard to the current Section 22.903 restrictions on joint personnel and officers, we believe that the approach we recently adopted in the *Dom/Nondom Order* strikes the appropriate balance with regard to the discrimination and price squeeze concerns that arise from such arrangements. Given our requirement of arms-length dealing between the incumbent LEC and the CMRS affiliate, we do not believe that the additional Section 22.903 requirements for separate personnel and officers are necessary to protect CMRS competitors from these harms.

63. Similarly, we do not believe more stringent safeguards are necessary to prevent the other type of price squeeze in which the CMRS affiliate might set its rates below those of its CMRS competitors, while the incumbent LEC parent remains profitable on a company-wide basis. If this reduction in rates by the CMRS affiliate causes other CMRS providers to match those reductions, this situation could, in the extreme, drive independent CMRS operators from the market, thereby presenting a competitive risk in the CMRS market and also the possible loss of a significant class of potential local exchange competitors. We conclude however, that, although the incumbent LEC may have the incentive to engage in such conduct, we have in place adequate safeguards against such conduct. The structural

safeguards we adopt today aid in the prevention and detection of this strategy.[154] We also note that LEC-CMRS affiliates could only successfully engage in this type of predatory strategy if they are able to drive independent CMRS competitors from the market, a result we do not believe to be likely, given the presence of multiple broadband CMRS licensees in every market. Given this condition, we believe the proliferation of CMRS providers in today's marketplace would make this strategy particularly difficult to execute. We note that antitrust laws also offer a measure of protection against this variety of price squeeze.[155] Finally, we recognize that the approach we are adopting today differs from the nonstructural safeguards approach the Commission took in the *Computer III* proceeding with respect to the provision of enhanced services by the BOCs and GTE. We note that a remand proceeding in *Computer III* is pending before us, and we will address the safeguard issues with respect to enhanced services by BOCs and GTE in that proceeding.[156]

5. Differences between In-Region Incumbent LEC-CMRS Safeguards and Current BOC Cellular Safeguards

64. In two critical respects, the requirements we adopt today are much less stringent than the current restrictions placed on BOC cellular through Section 22.903. First, we do not require the CMRS separate affiliate to have officers and employees separate from the incumbent LEC.[157] We do not believe that this restriction is necessary to prevent anticompetitive discrimination and cost misallocation, especially given the other requirements that we adopt. For instance, given that any services the incumbent LEC provides its CMRS affiliate are subject to the affiliate transaction rules, the CMRS affiliate must account for the time and cost of any employees that may in effect work for both the CMRS affiliate and the incumbent LEC operation. We are persuaded by commenters that a flat ban on common employees will unnecessarily impose an efficiency cost upon incumbent LECs, and that eschewing these efficiencies is not outweighed by any competitive benefit from such a ban.

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[154] *See Access Charge Reform Order* at ¶¶ 278-79; *Dom/Nondom Order* at ¶¶ 163-69.

[155] We stated in our recent *Access Charge Reform Order*: "Although we believe it would not serve the public interest for us knowingly to permit a price squeeze to occur, and to rely entirely on the adequacy of antitrust law remedies to protect the public, we take comfort in the fact that such remedies exist should an anticompetitive price squeeze occur in spite of the safeguards we have adopted." *Access Charge Reform Order* at ¶ 282.

[156] *See* note 39.

[157] *See* 47 C.F.R. § 22.903(b)(2) and (3).

65. Second, unlike the BOC cellular affiliate requirements of Section 22.903,[158] we permit the CMRS separate affiliate to own its own wireline local exchange facilities, and the CMRS affiliate may operate as a competitive local exchange carrier in its region. The only restriction on the wireline LEC activities of the CMRS affiliate is that the affiliate may not jointly own transmission and switching facilities that the affiliated LEC uses for the provision of local exchange service in the region. This safeguard is generally consistent with the proposal we made in the *Notice*.[159] We note that this position is also consistent with our recent *Non-Accounting Safeguards Order*, released after the *Notice*.[160]

66. We believe it is important to permit the incumbent LEC's CMRS affiliate to own facilities for the provision of competitive landline local exchange service, including obtaining access to unbundled network elements from its incumbent LEC affiliate, so that the CMRS affiliate will have the ability to provide consumers with an integrated package of CMRS and local exchange services. Indeed, we see no sound economic or other public interest reason to prevent the CMRS affiliate from acquiring and deploying its own landline local exchange

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[158] Section 22.903(a) prohibits, *inter alia*, BOC cellular affiliates from owning "any facilities for the provision of landline service." Unlike the other aspects of Section 22.903 discussed above, Section 22.903(a) is not technically a structural separation requirement, but is a restriction on a BOC cellular affiliate's ownership of landline facilities, regardless of whether the landline facilities in question are used by or associated with the affiliated LEC. 47 C.F.R. § 22.903(a).

[159] In the *Notice*, we proposed to amend our rules to permit a BOC cellular affiliate to own landline facilities for the provision of landline services, including competitive landline local exchange (CLLE) and interexchange service, in the same market with the affiliated LEC. *Notice*, 11 FCC Rcd at 16669, ¶ 59. Competitive landline local exchange service refers to landline local exchange service offered by a carrier other than the incumbent LEC. *See SBMS Waiver Order.* We also proposed to continue to prohibit the BOC cellular affiliate from owning -- including jointly owning with the affiliated BOC -- landline facilities that the BOC uses in the provision of landline local exchange services. The *Notice* made a similar proposal regarding LEC provision of in-region PCS. Specifically, we proposed to require that all Tier 1 LECs establish a separate affiliate for the provision of in-region PCS that, among other things, does not jointly own with the LEC transmission or switching facilities that the LEC uses for the provision of in-region local exchange service. *Id.* at 16695-96, ¶ 118.

In making this proposal, we did not intend to imply that BOCs would be able to circumvent the requirements of the Communications Act or Commission regulations regarding BOC provision of interLATA service. Any offering of interLATA service by a BOC is subject to the provisions of the Communications Act governing BOC entry into the interLATA market. *See* 47 U.S.C. §§ 271, 272. We were merely trying to illustrate one advantage of common ownership of landline facilities -- after the BOC satisfies all relevant requirements and is granted interLATA authority.

[160] In the *Non-Accounting Safeguards Order*, the Commission concluded that operational independence of BOCs and their interLATA affiliates, as required by Section 272 of the Communications Act, precludes BOCs and their interLATA affiliates from jointly owning transmission and switching facilities, as well as from jointly owning the land and buildings where those facilities are located. *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 21981-84, ¶¶ 158-162.

facilities and therefore becoming a competitive LEC in its region. At the same time, the prohibition on an affiliate's joint ownership of the LEC's local exchange facilities remains appropriate because common ownership poses a considerable risk that a LEC will allocate costs improperly and discriminate in favor of its affiliate. The potential for improper cost allocation and discrimination would be difficult to detect if the facilities were commonly owned. This approach is fully consistent with our decision in the *Non-Accounting Safeguards Order* to permit a BOC long distance affiliate to resell local exchange services and to obtain interconnection and access to unbundled network elements from the BOC for the purpose of the affiliate creating its own local exchange service offerings, including bundled packages.[161]

67. Our decision today does not preclude the CMRS affiliate from using the affiliated incumbent LEC's central office, switch, roof space or other facilities -- the incumbent LEC and the CMRS affiliate are merely precluded from jointly owning such facilities. Indeed, the rule we adopt today does not preclude the affiliate from jointly using the LEC's landline facilities to provide integrated service (subject to applicable interconnection and other regulations). Such transactions between the CMRS affiliate and the incumbent LEC for joint use would be subject to the affiliate transaction rules, requiring arm's length dealing, and the requirement that any Title II common carrier services, or service, facilities, or network elements acquired by the affiliate pursuant to tariff or Sections 251 and 252 be made available to independent CMRS operators on the same rates, terms, and conditions.

68. Our decision to establish this safeguard also is consistent with our August 1996 decision to grant Ameritech Communications, Inc. (ACI), a structurally separate Ameritech affiliate, a waiver of Section 22.903(a) to permit it to own landline facilities. In seeking the waiver, ACI stated that its goal was to be able to provide wireless and wireline services as a facilities-based carrier and through resale on an unseparated basis. ACI noted that potential competitors, such as interexchange carrier affiliates and PCS providers, were not prohibited from making bundled service offerings.[162] In the *ACI Waiver Order*, we concluded that ACI's status, as a structurally separate subsidiary of Ameritech that is also separate from Ameritech's incumbent cellular operations, considerably alleviated any concerns regarding potential improper cost allocation or discrimination. We granted the waiver with respect to both in-region and out-of region operations, on the condition that ACI remain structurally separate from Ameritech's local exchange companies and its cellular affiliate.[163]

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[161] *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 22055-58, ¶¶ 312-16.

[162] *ACI Waiver Order*, 12 FCC Rcd at 6333-35, ¶¶ 5, 7.

[163] *Id.* at 6341-42, ¶ 19.

C. In-Region Safeguards Applicable to Rural and Certain Mid-Sized Incumbent LECs

69. As discussed above, we impose a set of structural and nonstructural safeguards where the incumbent LEC has the incentive and ability to act anticompetitively to the benefit of its own CMRS operations and against CMRS competitors, and in general conclude that the benefits of these safeguards in helping us to detect and prevent anticompetitive conduct, especially discrimination, outweigh any costs of separation. As discussed in section V.B above, where the incumbent LEC lacks this incentive and ability, we do not require separation (*e.g.*, out-of-region and de minimis overlap). Consistent with these actions, we agree with the concern of some commenters that, for certain incumbent LECs, the costs imposed by separation may outweigh our interest in promoting competition and preventing anticompetitive conduct. This is especially true for incumbent LECs that Congress itself found should be exempt from key pro-competitive provisions of the Communications Act pending a bona fide request for interconnection and action by the state commission.

70. We agree with the comments of independent incumbent LECs that we should use some distinction other than the Class A/Class B classification for imposing a separate affiliate requirement on incumbent LECs. In the 1996 Act Congress expressed particular concern about burdens placed on small and rural LECs. In determining where to draw the appropriate balance between concerns about burdens on LECs other than the largest LECs, Congress, in Section 251 of the Communications Act, excluded two groups of LECs from the same good faith negotiation, interconnection, unbundling, resale, network disclosure and physical collocation requirements imposed on other LECs.[164] First, a rural telephone company[165] is exempt from the above-referenced Section 251 requirements until such company receives a bona fide request for interconnection and the state commission acts to terminate the exemption. Second, local exchange carriers with fewer than two percent of the nation's subscriber lines installed in the aggregate nationwide may petition a state commission for suspension or modification of requirements in Section 251(b) and (c).[166]

71. We find that it is appropriate and equitable, in the first instance, to exempt rural telephone companies from the separate affiliate requirement. A competing carrier, interconnected with the rural carrier, however, may petition the Commission to remove the exemption, or the Commission may do so on its own motion, where the rural telephone company has engaged in anticompetitive conduct, such as discrimination. We also find, consistent with Congress's treatment of LECs in Section 251, that incumbent LECs with fewer than two percent of the nation's subscriber lines, may petition this Commission for suspension

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[164] *See* 47 U.S.C. § 251(f). *See also First Local Competition Order*, 11 FCC Rcd at 16111, ¶¶ 1249-50.

[165] "Rural telephone company" is defined at 47 U.S.C. § 153(37). *See supra* note 11.

[166] 47 U.S.C. § 251(b), (c).

or modification of the separate affiliate requirement. The Commission will grant such a petition where petitioner can show that suspension or modification of the separate affiliate requirement is necessary to avoid a significant adverse economic impact on users of telecommunications services generally, or to avoid a requirement that would be unduly economically burdensome. In addition, petitioners must demonstrate that suspension or modification of the requirement is consistent with the public interest, convenience and necessity. Suspension or modification would be appropriate, for example, where the carrier with less than two percent of the nation's subscriber lines can show that it lacks the incentives and ability to use bottleneck facilities to act anticompetitively, such as where the percentage of overlap exceeds the 10 percent standard for de minimis overlap, but is still not significant.

72. We conclude that these provisions for exemption for rural telephone companies, and for suspension and modification with respect to local exchange companies with fewer than two percent of the nation's subscriber lines, from the separate affiliate requirements are appropriate notwithstanding our conclusion in the *Dom/Nondom Order* that neither a carrier's size nor the geographic characteristics of its service area, will by themselves affect the incentives or ability to discriminate against rivals, or to engage in other anticompetitive activity.[167] It is possible, for example, that the wireline and CMRS service areas of a rural telephone company or a carrier having fewer than two percent of the nation's subscriber lines could overlap 100 percent. The fact that the number of lines within the service territory may be less than two percent of nationwide subscriber lines does not by itself say anything about the carrier's degree of market power or its incentives or ability to use bottleneck facilities -- the wireline network -- to act anticompetitively toward rivals. For this same reason, we disagree with ITTA's suggestion that the Commission only apply separate affiliate requirements if the CMRS provider has at least 10 MHz of spectrum, or 10 percent of the available licensed spectrum.[168] The amount of spectrum possessed by the CMRS provider does not address its ability to use its control over bottleneck incumbent LEC facilities to engage in anticompetitive conduct.

73. We agree with BellSouth and PUCO, however, that some LECs, especially rural telephone companies, might not have the resources to comply with our separate affiliate safeguards and still provide CMRS.[169] Broadband CMRS may, for example, be more costly in rural areas, where there are fewer potential subscribers over which to spread the fixed costs of deployment. By reducing the regulatory burden on rural LECs we will encourage the development of wireless services in areas where otherwise there may be no wireless service at all. We also believe that rural LECs may find it economical to use CMRS licenses to provide

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[167] *Dom/Nondom Order* at ¶ 183.

[168] ALLTEL & ITTA *ex parte* Comments at 2.

[169] BellSouth Comments at 4; PUCO Comments at 17.

fixed wireless services in remote areas as an alternative means of extending the local exchange network to unserved or hard to serve areas, and we are concerned that the costs of maintaining a separate affiliate for CMRS could deter rural telephone companies from using wireless as a means of extending service.[170] Additionally, we observe that, in many instances, wireless service areas will likely be larger than the wireline service area of the rural incumbent LEC. In such situations, even where the area of overlap exceeded ten percent the rural telephone company's incentive and ability to engage in discrimination and other anticompetitive conduct would be attenuated by the lack of overlap.

74. Moreover, under Section 309(j)(3) of the Communications Act[171] the Commission is required to promote the development and rapid deployment of new technologies, products, and services for benefit of the public, including those residing in rural areas, and to disseminate licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women. Thus, foregoing a separate affiliate requirement for rural incumbent LECs and allowing these carriers to minimize any additional costs and reporting requirements promotes the goals set by Congress in Section 309(j). For all these reasons, we believe that, on balance, the public interest would not be served by requiring rural telephone companies to maintain separate affiliates to provide CMRS.

75. These factors also distinguish the provision of CMRS by rural telephone companies from the provision of long distance services. In our *Dom/Nondom Order*, the Commission declined to exempt rural carriers from the requirement of providing long distance through a separate affiliate.[172] In that case, however, there was no suggestion in the record that a separate affiliate requirement could result in long distance services not being offered to subscribers in rural areas.[173] Similarly, because long distance is a complement and not a substitute to local wireline service, there were no issues concerning the use of a substitute technology to extend service.[174]

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[170] *See Notice*, 11 FCC Rcd at 16694, ¶ 115; *see also* RTG Comments at 3; PUCO Comments at 18 (small and rural telephone companies pose no threat of anticompetitive conduct toward potential wireless competitors, and safeguards would be a significant burden and would have a detrimental impact on wireless competition in rural areas).

[171] 47 U.S.C. § 309(j)(3).

[172] *Dom/Nondom Order* at ¶ 183.

[173] *Id.* at ¶ 181.

[174] *Id.* at ¶ 26.

76. For similar reasons, we will permit carriers serving fewer than two percent of the nation's subscriber lines to petition the Commission for suspension or modification of the separate affiliate requirement. These carriers are also likely to have fewer resources such that the balance between the pro-competitive benefits of requiring provision of CMRS through a separate affiliate, in particular cases, may be outweighed by other factors, including the extension of the network in rural areas, or disincentives to any CMRS deployment. The incentives and ability to engage in anticompetitive practices may also be attenuated by a substantial lack of overlap between wireline and wireless service areas or other market conditions.

77. We disagree with GTE's and BellSouth's argument that the two percent benchmark is an arbitrary point of delineation.[175] We note that the structure of eligibility for exemptions and for suspension and modification of the separate affiliate requirement parallels the benchmarks Congress established in Section 251(f). In that section, Congress recognized that it would be appropriate to treat rural telephone companies and companies serving less than two percent of the nation's subscriber lines differently from other incumbent LECs. Incumbent LECs that are exempt or that obtain a suspension or modification under Section 251(f) are not subject to core interconnection, unbundling, resale, network disclosure and physical collocation requirements pending state action, while other incumbent LECs were required immediately to comply with all of the requirements of Section 251. The distinctions Congress drew in Section 251(f) are particularly significant here because Congress was itself balancing the cost of imposing particular, significant pro-competitive rules on such companies against the benefits of competition. We have sought to strike a similar balance between the benefits of policing discrimination and other anticompetitive conduct in an increasingly competitive environment, and the costs of structural separation particularly for rural telephone companies and companies serving fewer than two percent of the nation's subscriber lines.

D. Joint Marketing

1. Overview

78. Section 601(d) of the 1996 Act provides:

> Notwithstanding section 22.903 of the Commission's regulations (47 C.F.R. 22.903) or any other Commission regulation, a Bell operating company or any other company may, except as provided in sections 271(e)(1) and 272 of the Communications Act of 1934 as amended by this Act as they relate to wireline service, jointly market and sell commercial mobile services in conjunction with

[175] BellSouth Reply Comments at 9-10; GTE Reply Comments at 13-14.

telephone exchange service, exchange access, intraLATA telecommunications service, interLATA telecommunications service, and information services.[176]

In the *Notice*, we observed that this provision is self-executing and thus nullified Section 22.903(e), which prohibited BOCs from engaging in the sale or promotion of cellular service on behalf of their separate cellular affiliates.[177] We also tentatively concluded, however, that we retain authority and responsibility for determining the scope of Section 601(d) with respect to joint marketing of wireless and wireline services as well as a LEC's resale of CMRS provided by its wireless affiliate.[178] In addition, the *Notice* postulated that the newly granted authority for BOCs to jointly market and sell CMRS and landline services under Section 601(d) raises the question of how CPNI should be treated in a "one-stop-shopping" type of environment.[179] These issues, along with the propriety of requiring network information disclosure, are discussed in greater detail below.

79. In the *Notice*, we tentatively concluded that the public interest in preventing and permitting easy detection of cross-subsidization requires that such joint marketing be done on behalf of the CMRS affiliate, subject to the affiliate transaction rules and classified as a nonregulated activity, on a compensatory, arms-length basis.[180] In addition, we proposed that all transactions be reduced to writing and be made available for public inspection.[181]

2. Comments

80. In general, the non-BOC commenters agree with our proposal that joint marketing be done on behalf of the CMRS affiliate, subject to the affiliate transaction rules and

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[176] Telecommunications Act of 1996, Section 601(d). Section 271(e)(1) sets forth limitations on joint marketing of local and long distance services by certain large national telecommunications carriers seeking to provide competitive local exchange service in a BOC's service area until that BOC is authorized pursuant to Section 271(d) to provide in-region interLATA services. Section 272 describes structural and transactional requirements for BOC provision of certain services, including in-region interLATA service, through separate corporate affiliates.

[177] *Notice*, 11 FCC Rcd at 16671, ¶ 63.

[178] *Id.* at 16666, 16668, ¶¶ 53, 57.

[179] *Id.* at 16674, ¶ 69.

[180] *Id.*

[181] *Id.*

classified as a nonregulated activity, on a compensatory, arm's-length basis.[182] Additionally, AT&T Wireless proposes that a BOC and affiliate that intend to market jointly should be required to announce the availability and terms of any such arrangement at least three months before implementation to prevent the affiliate from having an unfair advantage over unaffiliated carriers.[183] AT&T Wireless also suggests that the Commission require public disclosure of the terms and conditions upon which such services are provided.[184] Comcast and Radiofone propose that all such joint marketing transactions be reduced to writing and made available for public inspection.[185] PUCO disagrees with the proposal to permit joint marketing of PCS and landline services on a compensatory arm's-length basis, subject to Part 64 cost allocation and affiliate transaction rules because it believes that the Part 64 rules will not eliminate the carrier's ability to shift PCS costs to regulated operations.[186]

81. BOC commenters contend that no rules for joint marketing are required to implement Section 601(d) of the 1996 Act.[187] These commenters argue that non-BOC wireless providers such as AT&T, Sprint, MCI and others have been aggressively marketing one-stop shopping. They contend that imposing joint marketing rules would distort the market by conferring an unfair advantage on these competitors while limiting the BOCs' ability similarly to offer one-stop shopping.[188] BellSouth disagrees with the suggestion that the sales and marketing arrangements between a LEC and a cellular affiliate must be reduced to writing, because Section 601(d) does not provide for such a requirement.[189]

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[182] AT&T Wireless Comments at 21; AirTouch Comments at 8; Comcast Comments at 17; Cox Comments at 7; Radiofone Comments at 8. BellSouth agrees that a BOC selling and marketing its affiliate's cellular service, if an affiliate is used, should be subject to the affiliate transaction rules and that this should be classified as a non-regulated activity, on a compensatory arm's-length basis. BellSouth Comments at 38.

[183] AT&T Wireless Comments at 21.

[184] *Id.*

[185] Comcast Comments at 17; Radiofone Comments at 8.

[186] PUCO Comments at 19-20.

[187] Bell Atlantic/NYNEX Comments at 24; BellSouth Comments at 35; SBC Comments at 11; Pacific Bell Comments at 4.

[188] Bell Atlantic/NYNEX Comments at 27; SBC Comments at 12. *See also* Pacific Bell December 4, 1996 *ex parte* Comments at 8 (the Commission should reject attempts to limit customer access to one-stop shopping); Bell Atlantic/NYNEX November 4, 1996 *ex parte* Comments at 2 (the relief granted by Section 601(d) was intended to enable the BOCs to offer one-stop shopping as their competitors have long been able to do).

[189] BellSouth Comments at 38.

3. Discussion

82. As we stated in the *Notice*, while we find that Section 601(d) negates Section 22.903(e), we believe that we retain authority to determine the permissible scope of LEC/CMRS joint marketing, including the rules to define the relationship between the affiliated entities engaged in such joint marketing. Section 601(d) expressly permits a BOC to market jointly and sell CMRS in conjunction with several types of landline services. Nothing in the plain language of Section 601(d) prohibits or circumscribes the Commission from imposing conditions on, or defining the permissible scope of, such joint marketing. Indeed, the authority to engage in joint marketing and sale of landline and CMRS services is expressly made subject to the provisions of Section 272, which include separate affiliate requirements.

83. Moreover, nothing in the legislative history provides or suggests that the Commission lacks authority to impose certain conditions on joint marketing of landline and CMRS services. As we pointed out in the *Notice*, the Joint Explanatory Statement of the Conference Committee contains no reference to, nor explanation of, the purpose or scope of Section 601(d). There is a reference to Section 601(d) in the House of Representatives floor debate in the statement of Representative Burr regarding the purpose of the "Manager's Amendment" that included the addition of Section 601(d) to proposed H.R. 1555.[190] But the statement of Rep. Burr merely indicates that Section 601(d) was designed to permit the BOCs to jointly market and resell the cellular services of their cellular affiliates and to provide the BOCs with sufficient relief from existing rules to permit them to offer one-stop shopping of local exchange services and cellular services.

84. We do not believe that it would be inconsistent with either Section 601(d) or the goal of permitting one-stop shopping for telecommunications services to impose minimal safeguards on incumbent LECs engaging in such joint marketing. As we discussed, in the *Notice*, these safeguards are intended to facilitate the easy detection and prevention of improper cost allocation. Accordingly, we will require that all incumbent LECs, other than LECs exempt from our separate affiliate rules, engaging in joint marketing of local exchange and exchange access and CMRS services, do so subject to the affiliate transactions rules (*i.e.*, governing the transaction between the company's wireline and wireless affiliates). Such CMRS activity will be classified as nonregulated under our accounting rules, and must be conducted on a compensatory, arm's-length basis. These agreements must be reduced to writing and must be made available for public inspection upon request. Pursuant to the procedures set forth in the *Accounting Safeguards Order* concerning making agreements available for public inspection, we require the CMRS affiliate, at a minimum, to provide a detailed written description of the terms and conditions of the transaction on the Internet

[190] *See* Cong. Rec. H8456 (daily ed. August 4, 1995) (statement of Rep. Burr).

within 10 days of the transaction through the company's home page.[191] The broad access of the Internet will increase the availability and accessibility of this information to interested parties, while imposing a minimum burden. We also require that the description of the terms and conditions of the transaction be sufficiently detailed to allow us to evaluate compliance with our accounting rules.[192] This information must also be made available for public inspection at the principal place of business of the parties, and must include a certification statement identical to the certification statement currently required to be included with all Automated Reporting and Management Information Systems (ARMIS) reports.[193] We believe these safeguards will make any attempted cost misallocation easier to detect and should reduce the potential for such abuses. Commenters did not address in any detail our proposed definition of joint marketing. We note that Section 22.903 has been in effect for approximately fifteen years without such a definition. We therefore see no reason to explicitly define this term in this proceeding.[194]

85. We do not accept the argument of several commenters that imposing conditions on joint marketing would distort the market by conferring an unfair advantage on competitors, such as AT&T, Sprint, MCI and others that are pursuing "one-stop shopping efforts." First we note that we are not prohibiting "one-stop shopping," and the conditions we have placed on joint marketing should not impede incumbent LECs' efforts to engage in one-stop shopping. Second, we note that to the extent the competitors identified here attempt to jointly market local exchange, interexchange and CMRS services, they must comply with Section 271(e)(1), and accompanying joint marketing safeguards.[195] Rather, we believe that these minimal requirements will provide consumers, the Commission, and competitors with sufficient information to evaluate whether an incumbent LEC is improperly allocating costs, and to make it easier to detect any improper allocation of costs that may occur.[196]

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[191] *See Accounting Safeguards Order*, 11 FCC Rcd at 17593-94, ¶ 122. *See also Dom/Nondom Order* at ¶ 105 & n.286.

[192] *See Accounting Safeguards Order*, 11 FCC Rcd at 17593-94, ¶ 122.

[193] *Id.*

[194] *See generally Non-Accounting Safeguards Order*, 11 FCC Rcd at 22036-50, ¶¶ 272-300.

[195] *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22038-42, ¶¶ 276-282.

[196] *See Dom/Nondom Order* at ¶ 105. We note that Sections 271(e)(1) and 272 are specifically exempted from Section 601(d). Thus, a BOC and its interLATA services affiliate must comply with Section 272(g) with respect to joint marketing.

E. Resale

1. Overview

86. In addition to permitting joint marketing of wireline and CMRS services, Section 601(d) of the 1996 Act expressly permits a BOC to resell CMRS in conjunction with wireline service. In the *Notice*, we sought comment on whether we should impose conditions implementing the resale authority of Section 601(d) and whether we should mandate public disclosure of rates, terms and conditions of service in cases where the LEC is reselling its cellular affiliate's service. We specifically asked whether we should prohibit "one-of-a-kind" volume discounts for cellular service sold by the cellular affiliate to the affiliated telephone company for resale to the end user. We also sought comment on how implementation of Section 601(d) should affect potentially related joint marketing and sale activities that are currently prohibited under Section 22.903, such as joint installation, maintenance, and repair of BOC cellular and landline local exchange services. We also sought comment on the effect of Section 601(d) on activities such as billing and collection.[197]

2. Comments

87. Bell Atlantic/NYNEX, GTE, and Pacific Bell contend that there should be no restrictions on a LEC's resale of CMRS, nor should a LEC be required to set up a separate affiliate for this purpose because a LEC that purchases CMRS for resale has no market power in the resale of CMRS.[198] Bell Atlantic/NYNEX also contends that the Commission should not mandate public disclosure of terms and conditions of service where resale is involved, because that would discourage vigorous price competition, remove the carrier's ability to make rapid, efficient responses to market conditions, and risk collusion, price-signalling and other anticompetitive conduct.[199] Bell Atlantic/NYNEX contends that no additional rules are needed to govern the costs of joint billing and collection, installation, maintenance and repair, and argues that the existing accounting, billing and collection rules are adequate to ensure that costs of operations are properly allocated.[200] GTE similarly contends that there is no need to impose special safeguards when a LEC resells CMRS services, or to establish unique obligations on the LEC or CMRS providers affiliated with a Class A LEC to disclose the CMRS rates, terms, and conditions.[201] GTE contends that the purchase for resale presents no

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[197] *Notice*, 11 FCC Rcd at 16673, ¶ 68.

[198] Bell Atlantic/NYNEX Comments at 27-29; GTE Comments at 30; Pacific Bell Reply Comments at 12-13.

[199] Bell Atlantic/NYNEX Comments at 28-29.

[200] *Id.* at 29.

[201] GTE Comments at 30.